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No. 73-1828

In the
Supreme Court of the United States
October Term, 1973

OLGA HOCHFELDER, et al.,
Petitioners,

vs.

MIDWEST STOCK EXCHANGE,
Respondent,

LEON S. MARTIN, et al.,
Petitioners,

vs.

MIDWEST STOCK EXCHANGE,
Respondent.

REPLY OF PETITIONERS FOR CERTIORARI TO BRIEF OF RESPONDENT

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We reply, not to traverse the many misrepresentations of Respondent, but only to point out one gross error which might seriously mislead this Court.

Respondent argues (Br. 11) that both courts below reached the same conclusion and that the case therefor falls within the wise rule of this Court that certiorari will not be granted, in the absence of a very exceptional showing of error, where two courts below have made con-

current findings. But here there were no concurrent findings. The trial court specifically found that Midwest was "arguably put on notice of Nay's untrustworthiness." (350 F. Supp. at 1124) The trial court based its summary judgment on the statute of limitations (350 F. Supp. 1125). The Court of Appeals disowned this basis for its summary judgment. (Pet. A 17-18) The trial court also based its summary judgment on its construction of Midwest's plaque as limited to the sale of listed securities and its assertion that "Nay's dishonesty did not involve the sale of listed securities." (350 F. Supp. at 1124) But the Court of Appeals was compelled to eliminate this basis for a summary judgment when petitioners cited *Etting* v. *U. S. Bank*, 1826, 24 U.S. 59, 74 and the many cases following that opinion of Chief Justice Marshall that no court can take a case from the jury on the construction of a writing where the issue is the effect that the writing was calculated to produce and did produce on others.

Since the Court of Appeals on motion for summary judgment has acted as a finder of facts, we submit that this Court in accordance with its prior practice should grant certiorari and reverse the case for trial. For this Court to allow the opinion of the Court of Appeals to stand will practically eliminate from the statute book Section 6 of the 1934 Securities Act.

Respectfully submitted,

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